National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 23, 1997

TO: Louis J. D'Amico, Regional Director, Region 5

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Bell Atlantic Network Services, et al., Cases 5-CA-27080, 27239 and 27240

133-7800, 530-6033-7056, 530-6050-0850, 530-6067-4055-3700

These cases were submitted for advice as to whether the Employers lawfully implemented a medical restrictions policy which gave it exclusive authority to determine the availability of accommodations for disabled employees.

facts

Charging Party Communications Workers of America ("Union") represents certain individuals employed at five affiliated Bell Atlantic companies located in Washington D.C., Maryland, Virginia and West Virginia ("Employers"). The parties are subject to a collective-bargaining agreement set to expire by its own terms on August 8, 1998.

On May 13, 1996, the Employers' director of labor relations, Ron Williams, notified Barbara Lephardt, a Union official, that by June 20 the Employers intended to modify the existing policy covering accommodations for medically restricted employees. Under this policy, which the Employer implemented without bargaining in 1983, partially disabled employees who cannot perform the "essential functions" of their current position with reasonable accommodation may be transferred to another available job, assuming that they can perform the essential functions of that position with or without accommodation. [1] Management officials, such as a human resources representative and a line supervisor, make the initial determination whether suitable work exists within the employee's medical restrictions. If the disability is expected to last for at least twelve months, the employee's case is reviewed by the Reasonable Accommodations Committee ("RAC"). The RAC performs two discrete functions. First, it ascertains whether placement in another available position with or without accommodation is possible. In order to do so, the committee assesses the essential functions of the employee's current position, the employee's capabilities under the medical restrictions, and whether any other work exists which the disabled employee can perform with or without reasonable accommodation. Secondly, if the committee concludes that suitable work does not exist, members of the RAC determine whether to retain or discharge the disabled employee. The RAC is comprised of a company lawyer, physician, human resources staffing manager and the affected employee's direct supervisor. A Union agent has never served on the RAC. The Union, however, may grieve and arbitrate the Employers' decision as to how to accommodate an employee or, if no such accommodation is possible, the resulting discharge.

The Employers proposed to modify the existing policy to allow it to convene the RAC within 60 days after the onset of an employee's medical restriction, rather than twelve months under the old policy. The Employers further sought to limit a disabled employee's right to return to his or her former position from a lower paying accommodation only within the first year after the start of the accommodation. Previously, there was no limitation on an employee's right to return.

Throughout the course of bargaining, the Union rejected the 60-day RAC review process and further complained that the proposed one-year right-to-return limitation was "a big change" and "totally unacceptable." The Union also steadfastly rejected the Employer's desire to retain for itself the authority to determine whether a reasonable accommodation exists. At the first bargaining session held on August 8, 1996, the Union submitted a written, narrative response to the Employers' proposal, wherein, among other things, it complained that under the proposed revised policy, the determination of the availability of suitable work is the exclusive responsibility of the HR representative, the supervisor and the job accommodations specialist. This process includes a review of the essential functions of the employee's current job, possible reasonable accommodations, and potential job reassignments -- each involving issues over which the Company is obligated to negotiate with the Union.

The Union proposed that a Union representative sit on the RAC in order to provide it with input into the accommodations process.

The Union did not incorporate the Employers' demands regarding the RAC or the limitation on an employee's right of return in its November 5, 1996, counterproposal. Instead, the Union reiterated its demand for a seat on the RAC. The Employer rejected the Union's counter.

The Employer continued to insist on retaining exclusive authority to determine the essential functions of a medically restricted employee's current job or potential accommodation. At a March 6, 1997, bargaining session, the Employers' representative indicated that under its proposal, a direct supervisor would determine the essential functions of each potential accommodation, with guidance from the human resources department and the RAC. The Employers stressed that the RAC -- not the Union or any other management body -- will have final authority to determine what constitutes suitable work which a disabled employee might be able to perform. The Union again asked for a presence on the RAC. The Employer rejected any Union role, assertedly because the RAC decides whether to discharge an employee, a management function which necessarily involves confidential analyses of the Employers' legal and contractual liabilities. The Employer stressed that the Union has the right to grieve, demand arbitration or sue the Employers for any accommodation granted or denied.

Since the Employers were unwilling to negotiate a Union role in determining a suitable accommodation, the Union demanded a list of the essential functions of each job. The Employers, however, refused to provide the information. They stated that the ADA obligates them to analyze each situation on a case-by-case basis and maintained that each employee's job may comprise a unique set of essential functions which cannot be specified in advance. The Union complained that the Employers' refusal to supply it with information concerning essential functions is a "big problem" blocking agreement.[2]

At the final bargaining session on May 8, 1997, the Employer again refused to agree to Union participation in the selection of a suitable accommodation. The Employers explained that they, not the Union, have an obligation under the ADA to identify the essential functions of all unit positions in order to find a reasonable accommodation. The Union asked if the Employer considered this process to be the sole responsibility of the Company. The Employer representative acknowledged that they did.

At the end of the May 8 session, the Union indicated that they would present a counterproposal at some time in the future. The Union, however, did not indicate when they would submit a counter or what it would contain. The Employers refused to delay implementation any longer. They declared that they had given the Union ample time to make a counter-offer and that they were only willing to review the Union's counter if presented that day, but no further. The Union refused to present an immediate counter. Accordingly, the Employer declared impasse and unilaterally implemented its proposal.[3]

action

Complaint should issue, absent settlement, alleging that the Employers refused to bargain and unlawfully implemented their accommodations policy, a mandatory subject of bargaining, in violation of Section 8(a)(5).

Where there is a valid impasse, an employer may implement terms of its last offer presented to the union.[4] A genuine impasse in negotiations exists when, despite the parties' best efforts to achieve an agreement, neither party is willing to move from its position.[5] However, "a finding of impasse presupposes that the parties prior to the impasse have acted in good faith."[6] Thus, a bargaining impasse cannot be reached in the presence of an unremedied refusal to bargain over a mandatory subject of bargaining.[7] An employer which enters into negotiations with a closed mind and an inflexible position fails to bargain in good faith.[8]

It is clear that employers have an obligation to bargain in a meaningful way over accommodations for medically restricted employees.[9] This is because such accommodations necessarily involve the elimination, alteration or creation of work assignments and job descriptions, topics which have long been held to constitute mandatory subjects of bargaining.[10] Thus, neither party may enter into negotiations over work assignments and job descriptions with a closed mind or a predetermined position destined to forestall good faith give and take over these mandatory subjects.

Here, however, the Employers never wavered from their oft-repeated position that they have the absolute right under the ADA

to make any accommodation they see fit, subject only to an employee's right to discuss the situation informally with the Union and the Union's right to grieve, arbitrate, or sue over the Employers' unilateral action.[11] The Respondents perhaps most clearly articulated its rejection of its bargaining obligations when, at the last bargaining session on May 8, they announced to the Union that they alone have the sole responsibility to identify the essential functions of an accommodation, without any input from the Union. The Employers used this interpretation of the ADA as a means to preclude meaningful negotiations over job descriptions (or, to use the Employers' terminology, a job's "essential functions") and work assignments which disabled employees currently hold or desire to obtain (i.e., "suitable work"). They further hindered negotiations by refusing to provide the Union with lists of employees' essential functions. Since this unlawful refusal to bargain about job descriptions and work assignments vitiated good-faith impasse, we conclude that the Employers were not privileged to declare impasse and unilaterally implement their proposal.[12]

The Employers are unconvincing when they argue that the ADA requires that they must retain exclusive authority to make accommodations. In general, competing federal statutes must each be regarded as effective if they are capable of co-existence and their application must be reconciled, at least in the absence of "a clearly expressed congressional intention to the contrary."[13] In Keystone Consolidated Industries,[14] the Board held that the employer unlawfully altered terms of a bargained-for pension plan without reaching good-faith impasse with the union. In so concluding, the Board rejected the employer's assertion that it was legally compelled to proceed unilaterally by ERISA and the Internal Revenue Code, statutes which charge pension plan administrators with the fiduciary responsibility to administer the plans. The Board acknowledged that mandates under other federal statutes "may serve to limit the area of discretion which a party may exercise in fulfilling [its] bargaining obligation."[15] Nonetheless, in the absence of language in those statutes which proscribe an employer from fulfilling its obligation under the National Labor Relations Act to bargain over changes in administration of its pension plan, the employer's unilateral act constituted a violation of Section 8(a)(5).[16]

The ADA does not compel the Employers to make reasonable accommodations in derogation of their obligation under the Labor Act to negotiate beforehand with their employees' designated bargaining representative. Rather, the Respondents are obliged to satisfy the requirements of both statutes without unnecessarily doing violence to the objectives of either.[17] The Employers did not attempt to do this and the ADA does not relieve them of liability under the Act for their unilateral behavior.[18]

Further, to the extent that the Employers' proposal for unilateral authority to assign employees light-duty work is a mandatory subject of bargaining under McClatchy Newspapers,[19] we conclude that the Employers were not privileged to implement it without first bargaining to impasse over the procedures by which assignments would be made and the criteria they would use to make them.

In Colorado-Ute,[20] the Board concluded that an employer lawfully can insist to impasse on a merit pay proposal which gave the employer unlimited discretion to determine merit wage increases, but that a bargaining impasse did not privilege the employer's unilateral exercise of its discretion in granting merit increases.[21] The Board subsequently refined its reasoning in McClatchy Newspapers, where it concluded that discretionary merit increase proposals, where there has been no good faith bargaining over criteria and procedures, timing and amounts, fall into the narrow class of mandatory subjects that cannot be implemented after impasse, i.e., that such a proposal constitutes an exception to the "implementation after impasse" rule. The Board held that unilateral implementation of such proposals -- even after good-faith impasse -- is inconsistent with the employer's established duty to bargain over procedures and criteria for determining merit increases for bargaining unit employees. Thus, the Board concluded that the "open-ended, intermittent disruption of collective bargaining" resulting from entirely discretionary shifts in wage rates was "inimical" to the policies of the Act because the employer's unilateral actions bypassed and disparaged the union as the employees' bargaining representative.[22]

Here, the Employers demanded unfettered discretion to change employees' job descriptions and work assignments. The Employers thereby also retained the unilateral authority to set an employee's wages simply by assigning an employee to a lower paying position. Further, the Employers reserved the unilateral right to discharge employees should they fail in their new assignment, subject only to a Union grievance. Despite their demand for autonomy, the Employers refused to bargain with the Union over the procedures they would follow in making any of these changes. Rather, they repeatedly indicated that negotiations would be futile in light of their assertion that the ADA required them to make these determinations unilaterally. Consequently, under the framework set forth in McClatchy Newspapers, although the Employers could lawfully bargain to

impasse for unilateral control over accommodations, we conclude that they could not lawfully implement their proposal without first reaching a good-faith impasse over procedures and criteria.

Accordingly, Complaint should issue, absent settlement, alleging that the Employers refused to bargain and unlawfully implemented their accommodations policy, a mandatory subject of bargaining, in violation of Section 8(a)(5).

B.J.K.

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[1] Under the Department of Labor's regulations implementing the equal employment provisions of the Americans with Disabilities Act ("ADA"), the term "essential functions" is defined as "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 CFR §1630.2(n).

[2] The Union has not filed a Section 8(a)(5) charge alleging the failure to provide this information.

[3] It is unclear whether the Employer has made an accommodation or discharged an employee under its implemented policy.

[4] Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enf'd sub nom. Television Artists AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

[5] CJC Holdings, Inc., 320 NLRB 1041, 1044 (1996).

[6] Circuit-Wise, Inc., 309 NLRB 905, 918 (1992).

[7] See, e.g., Retlaw Broadcasting Company, 324 NLRB No. 18, ALJD slip op. at 6 (July 29, 1997) (impasse not valid and implementation unlawful where created, even in part, by insistence on bargaining over individual employee contracts, a non-mandatory subject).

[8] Clesco Mfg. Div. of Cleveland Sales Co., 292 NLRB 1151 (1989), enf'd per curiam 915 F.2d 1570 (6th Cir. 1990) (employer unlawfully entered post-settlement negotiations with a fixed mind where it never varied its position on a contract termination date).

[9] See General Counsel Memorandum 92-9, "Americans with Disabilities Act, 42 U.S.C. 12101, et seq.," at p. 2, dated August 7, 1992, providing that an employer may violate Section 8(a)(5) of the Act if it "unilaterally implements a 'reasonable accommodation' for a disabled employee or otherwise alters its employment practices so as to change wages, hours or other working conditions" without bargaining beforehand to good-faith impasse with the union.

[10] See, e.g., Detroit News, 319 NLRB 262 (1995) (unilateral change in work assignments, unlawful); St. Luke Lutheran Home for the Aging, 317 NLRB 575 (1995) (same); Bay State Gas Co., 253 NLRB 538, 539 (1980) (unlawful unilateral elimination of job description); Central Cartage, Inc., 236 NLRB 1232, 1237-39 (1978), enf'd per curiam 607 F.2d 1007 (7th Cir. 1979) (unlawful unilateral implementation of changed job description).

[11] Of course, the ability to grieve and/or arbitrate a contractual violation or seek redress under another statutory scheme does not satisfy the Employers' obligations under the Act or supplant a party's right of access to the Board.

[12] The Employers' claim that the Union was to blame for the impasse by bargaining in a dilatory fashion over a twelve-month period with no intention of reaching agreement is immaterial, even if true, in light of the Employers' refusal to bargain about accommodations ab initio. Thus, the Employers' unwillingness to negotiate in good faith "precluded the existence of a situation in which [the Union's] good faith could be tested." Continental Nut Co., 195 NLRB 841, 858 (1972) (employer held not to have engaged in surface bargaining in part because union refused to negotiate in good faith).

[13] Morton v. Mancari, 417 U.S. 535, 551 (1974). See also, e.g., Commonwealth of Pennsylvania v. Interstate Commerce Commission, 561 F.2d 278, 292 (D.C. Cir. 1977), cert. den. 434 U.S. 1011 (1978) ("It is well established that when two regulatory systems are applicable to a certain subject matter, they are to be reconciled and, to the extent possible, both given effect"); Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) ("It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, 'when two statutes are capable of co-existence, it is the duty of the courtsÿ...ÿto regard each as effective,'" quoting Morton v. Mancari, supra).

[14] 309 NLRB 294 (1992), enf. den. on other grounds sub nom. Keystone Steel & Wire v. NLRB, 41 F.3d 746 (D.C. Cir. 1994).

[15] Id. at 298, quoting Foodway, 234 NLRB 72, 77 (1978).

[16] See also Dickerson-Chapman, Inc., 313 NLRB 907, 942 (1994) (OSHA does not relieve employer of statutory obligation to bargain over designation of employee as OSHA-defined "competent person," involving assignment of new duties).

[17] Accord: Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), cert. den. 117 S.Ct. 1318 (1997) (ADA does not require reasonable accommodations that violate seniority rights in a collective-bargaining agreement). However, in an advisory opinion submitted by letter dated November 1, 1996, to the Division of Advice the EEOC has taken the countervailing position that, "[w]hen an employer seeks to provide a reasonable accommodation that conflicts with collectively bargained seniority rules, ... the substance of a union's reasonable accommodation obligation is to negotiate with the employer to provide a variance to the collective-bargaining agreement, if no other reasonable accommodation exists and the proposed accommodation does not unduly burden non-disabled workers or otherwise pose an undue hardship." We need not address the validity of the EEOC's analysis here -- a conclusion which is at odds with the Seventh Circuit's Eckles decision -- because by their own actions the Employers foreclosed any opportunity to bargain for a variance to the parties' collective-bargaining agreement.

[18] We further conclude, however, that the Employers had no obligation to bargain about a Union presence on the RAC so long as one of the RAC's primary duties comprises a management function, i.e., deciding whether to retain or discharge an employee who cannot be reasonably accommodated. See International Association of Heat & Frost Insulators (Master Insulators Assoc.), 263 NLRB 922 (1982) (Section 8(b)(3) violation; union may not dictate the identity of employer representatives who interpret contract).

[19] 321 NLRB 1386 (1996), on remand from NLRB v. McClatchy Newspapers, 964 F.2d 1153 (D.C. Cir. 1992).

[20] Colorado-Ute Electric Ass'n, 295 NLRB 607 (1989), enf. den. 939 F.2d 1392 (10th Cir. 1991), cert. den. sub nom. IBEW Local No. 111 v. Colorado-Ute Electric Ass'n, 504 U.S. 955 (1992).

[21] Colorado-Ute, 295 NLRB at 608-10 (Board held that a proposal for unlimited management discretion in determining merit wage increases required the union's waiver of its statutory rights under Section 8(a)(5) of the Act).

[22] 321 NLRB at 1391.